In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 914

LOUIS C. VIALE, JOSEPH S. PINNAVIA, LOUIS A. ABBONANDO, ANTHONY F. FINO AND NICHOLAS S. LONGO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on January 31, 1963 (Pet. 17). The petition for a writ of certiorari was filed on March 8, 1963, and was therefore out of time under Rule 22–2 of the Rules of this Court.

In any event, the questions raised do not merit the consideration of the Court. After a jury trial in the United States District Court for the Western District of New York, petitioners, together with co-defendant Faliero, were convicted under a three-count indictment charging conspiracy (18 U.S.C. 371),

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failure to pay the special occupational tax for accepting wagers (26 U.S.C. 4411 and 7262), and failure to register and file a return (26 U.S.C. 7203). Petitioner Viale was sentenced to imprisonment for one year and to pay fines totaling $5,000; Fino to imprisonment for one year and to pay fines totaling $3,000; Pinnavia, Abbonando, Longo and Faliero to fines totaling $3,000 and to one-year prison sentences which were suspended for a probation period of five years (I R. 8–23). The court of appeals reversed as to Faliero but affirmed the convictions of petitioners (Pet. 17–30).

Prior to trial, petitioners moved to suppress all evidence seized under search warrant on May 12, 1961, at 19 Allen Street, Buffalo, New York (a business building owned and occupied by petitioner Viale), and at 111 North Pearl Street (a residence building at the rear of the other building, also owned and occupied by Viale). The single ground of the motion was that the officers failed to comply with the requirements as to entry set forth in *Miller* v. *United States,* 357 U.S. 301. During the argument of this motion, petitioners' counsel mentioned that the officers also searched the persons of individuals who were found on the premises, but conceded that this was not within the scope of the motion (II R. 9). Counsel refused the invitation of the court to offer evidence, and the motion was denied (II R. 14). At the trial, however, evidence relevant to the motion was heard.

Internal Revenue Agent Willis testified that on April 11, 1961, he was introduced to Viale at the latter's haberdashery at 19 Allen Street and Viale

agreed to accept bets on horse races from him. After accepting bets on several occasions, Viale agreed to pay Willis a commission and gave him three telephone numbers to which he was to call in his bets in the future (II R. 16–18). Through a subsequent conversation with Viale, Willis learned the nicknames of three of the men who would receive the bets.[1] Willis settled a total of $2,057 in bets with Viale during the month prior to May 12, while agents kept the premises under surveillance (II R. 19–27). It was ascertained that neither Viale nor anyone else located at these two addresses had procured tax stamps (II R. 32).

A search warrant for both addresses and an arrest warrant for Viale were executed on May 12 at approximately 11:45 a.m. Agents approached the two buildings from both front and rear. An agent at the rear of the business building (Allen Street) knocked on the door and called in a loud voice that they were federal officers with a search warrant. After waiting two or three minutes with no response, they forced the lock with a sledge hammer and entered (II R. 28). Ascending the stairs to the second floor, they went through a vacant sitting room to another room where they found four men. Three of the men—later identified as Fino, Abbonando and Pinnavia—were seated at a table which held a large rack and other wagering paraphernalia. Longo was in a

[1] These were "Jimmy", "Nick" and "Tony". The full names of three of the defendants subsequently arrested at the Allen Street address were Marino J. Faliero, Anthony Fino and Nicholas Longo.

chair next to the table. All of the men jumped to their feet; Pinnavia scattered papers to the floor and Fino dropped the telephone he was holding and beat a hasty retreat to the next room, locking the door behind him (I R. 62–64; II R. 28–29, 55–56).

The door to the other room was forced and Fino was brought back. They were all asked what they were doing there. Fino said he was there to clean the rooms (I R. 64); Pinnavia, that he was on a visit (I R. 82). The men were searched, and each was found to have a Yale key which would operate the lock on the door opening to the second floor stairway (I R. 64, 79, 81, 83). Abbonando's wallet contained a card with some telephone numbers written on it (I R. 81). None had any tax stamps on his person (I R. 89). They were told they were under arrest (I R. 91).

The court of appeals found that the evidence overwhelmingly sustained the conviction of Viale. It held that 26 U.S.C. 7608, the statute relied upon by the government to support the arrest without warrant and the personal search of the other petitioners, did not (as of May 12, 1961) apply to arrests for violations of the wagering tax laws, which appear in subtitles D and F of Title 26, but only to violations of subtitle E. Accordingly, the validity of the arrest was governed by state law. *United States* v. *Di Re*, 332 U.S. 581. Since a federal revenue agent is not a "peace officer" within the meaning of Section 177 of the New York Code of Criminal Procedure, the court appraised the validity of the arrest under Section 183 of that Code, which authorizes a "private person"

to arrest another "[f]or a crime, committed or attempted in his presence," or "[w]hen the person arrested has committed a felony, although not in his presence." Though recognizing that the indictment could have charged petitioners with felonies, 26 U.S.C. § 7201, the court observed that they were in fact charged with misdemeanors and that, in the absence of an adjudicated felony, the arrests were justified only if the crimes were committed in the "presence" of the arresting officers—*i.e.*, only if the officers actually witnessed acts which would indicate to a reasonable man that a crime was in the course of commission.

The questions raised by petitioners have no significance for the future, since 26 U.S.C. 7608 has been amended, effective as of October 23, 1962 (76 Stat. 1143), to cover the type of revenue agents involved here. In any event, the arguments advanced in the petition are without merit.

In this Court petitioners contend that the agents not only had no authority to arrest, but that they had no authority even to execute the search warrant, inasmuch as they were not covered by 26 U.S.C. 7608. However, 18 U.S.C. 3105 provides that a search warrant "may in all cases be served by any of the officers mentioned in its direction," as well as "by an officer authorized by law to serve such warrant." The agents here were "officers" within the meaning of this provision, since under 26 U.S.C. 7803 the Secretary of the Treasury or his delegate is authorized to appoint such persons as he may deem proper for the enforcement of the internal revenue laws.

Moreover, contrary to petitioners' contention, the arrests were plainly valid. The agents had already ascertained that neither Viale nor any of the other petitioners had procured tax stamps, and no stamps were posted on the premises, as required by 26 U.S.C. 6806. Petitioners were all seated at a table upon which various wagering paraphernalia were placed; and two of petitioners, Fino and Pinnavia, were using the telephones when the agents entered the room. Thus, the agents had ample reason to believe that Fino and Pinnavia were in the process of accepting wagers illegally. And since petitioners Abbonando and Longo were present in the same room and seated at the same table, it was reasonable to suppose that these two petitioners were then and there participating in a conspiracy with the others.

Finally, the officers plainly had the right to undertake a search of petitioners' persons as an incident to the valid arrests. The court of appeals properly noted that the rationale which justifies a search of the arrestee's person and premises in connection with a lawful arrest—as set forth in *United States* v. *Rabinowitz*, 339 U.S. 56, 60–61—is equally applicable whether the arrest is made by an officer or by a private citizen. But even if the right of a private person to search the *premises* of the arrestee be more limited than the corresponding right of a public officer, there can be no doubt, we think, that the private arrestor's right of search extends at least to the *person* of the arrestee. Thus, the search of the premises here were justified by the search warrants; and the search of the person was permissible as an

incident of the arrests. See, in addition to the cases cited by the court of appeals, *Dorsey* v. *United States*, 174 F. 2d 899 (C.A. 5), certiorari denied, 338 U.S. 950.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

APRIL 1963.

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